

## Article 8A.

### Powers, Duties, and Liability of a Power Holder Other Than a Trustee; Duty and Liability of a Trustee With Respect to Power Holder's Actions.

#### **§ 36C-8A-1. Definition.**

For purposes of this Article, the term "power holder" means a person who under the terms of a trust has the power to take certain actions with respect to a trust and who is not a trustee or a settlor with a power to direct or consent pursuant to G.S. 36C-8-808. (2012-18, s. 3.4.)

#### **§ 36C-8A-2. Powers of a power holder.**

(a) The terms of a trust may confer upon a power holder a power to direct or consent to a duty that would normally be required of a trustee, including, but not limited to, a power to direct or consent to the following:

- (1) Investments, including any action relating to investment of all or any one or more of the trust assets that a trustee is authorized to take under this Chapter.
- (2) Discretionary distributions of trust assets, including distributions to one or more beneficiaries, distribution of one or more trust assets, and termination of the trust by distribution of all of the trust assets.
- (3) Any other matter regarding trust administration, including the transfer of the principal place of administration of the trust.

(b) The terms of a trust may also confer upon the power holder any other power, including, but not limited to, the power to do the following:

- (1) Modify or amend the trust to do any of the following:
  - a. Achieve favorable tax status under applicable law.
  - b. Take advantage of laws governing restraints on alienation or other State laws restricting the terms of the trust, distribution of trust property, or the administration of the trust.
- (2) Remove and appoint trustees and power holders.
- (3) Increase or decrease the interests of any beneficiary.
- (4) Grant a power of appointment to one or more beneficiaries of the trust or modify the terms of or terminate a power of appointment granted to a beneficiary by the governing instrument, except that a grant or modification of a power of appointment may not grant a beneficial interest to any of the following:
  - a. Any individual or class of individuals not specifically provided for in the trust instrument.
  - b. The person having the power to grant, modify, or terminate the power of appointment.
  - c. The estate and creditors of the person having the power to grant, modify, or terminate the power of appointment.
- (5) Change the governing law of the trust. (2012-18, s. 3.4.)

#### **§ 36C-8A-3. Duty and liability of power holder.**

(a) A power holder is a fiduciary with respect to the powers conferred upon the power holder who, as such, is required to act in good faith and in accordance with the purposes and terms of a trust and the interests of the beneficiaries, except a power holder is not a fiduciary with respect to the following:

- (1) A power to remove and appoint a trustee or power holder.
  - (2) A power that constitutes a power of appointment held by a beneficiary of a trust.
  - (3) A power the exercise or nonexercise of which may affect only the interests of the power holder and no other beneficiary.
- (b) A power holder is liable for any loss that results from breach of fiduciary duty occurring as a result of the exercise or nonexercise of the power.
- (c) The following provisions applicable to a trustee shall also be applicable to a power holder with respect to powers conferred upon the power holder as a fiduciary:
- (1) The provisions of G.S. 36C-8-814 regarding discretionary powers and tax savings.
  - (2) The provisions of G.S. 36C-10-1001 through G.S. 36C-10-1012 regarding liability of trustees and rights of third persons dealing with trustees.
  - (3) The provisions of Article 9 of this Chapter regarding the uniform prudent investor rule. (2012-18, s. 3.4.)

#### **§ 36C-8A-4. Duty and liability of trustee.**

- (a) If the terms of a trust confer upon a power holder the power to direct certain actions of the trustee, the trustee must act in accordance with the direction and is not liable, individually or as a fiduciary, for any loss resulting directly or indirectly from compliance with the direction unless compliance with the direction constitutes intentional misconduct on the part of the trustee.
- (b) If the terms of a trust confer upon the power holder the power to consent to certain actions of the trustee, and the power holder does not provide consent within a reasonable time after the trustee has made a timely request for the power holder's consent, the trustee is not liable, individually or as a fiduciary, for any loss resulting directly or indirectly from the trustee's failure to take any action that required the power holder's consent.
- (c) If the terms of a trust confer upon the person a power other than the power to direct or consent to actions of the trustee, the trustee is not liable, individually or as a fiduciary, for any loss resulting directly or indirectly from the exercise or nonexercise of the power.
- (d) The trustee has no duty to monitor the conduct of the power holder, provide advice to the power holder, or consult with the power holder. The trustee is not required to give notice to any beneficiary of any action taken or not taken by the power holder whether or not the trustee agrees with the result. Administrative actions taken by the trustee for the purpose of implementing directions of the power holder, including confirming that the directions of the power holder have been carried out, do not constitute monitoring of the power holder nor do they constitute participation in decisions within the scope of the power holder's authority. (2012-18, s. 3.4.)

#### **§ 36C-8A-5. Compensation and reimbursement of expenses of power holder.**

A power holder as a fiduciary is entitled to compensation and reimbursement of expenses as provided in G.S. 32-59. (2012-18, s. 3.4.)

#### **§ 36C-8A-6. Jurisdiction over power holder.**

- (a) By accepting appointment to serve as a power holder with respect to a trust having its principal place of business in this State, or by moving the principal place of administration to this State, the power holder submits personally to the jurisdiction of the courts of this State regarding any matter involving action or inaction of the power holder.

(b) This section does not preclude other methods of obtaining jurisdiction over a power holder. (2012-18, s. 3.4.)

**§ 36C-8A-7. Accepting or declining the appointment as power holder.**

(a) A person designated as a power holder accepts the appointment to serve as a power holder:

- (1) By substantially complying with a method of acceptance provided in the terms of a trust; or
- (2) If the terms of a trust do not provide a method or the method provided in the terms of a trust is not expressly made exclusive, by exercising powers or performing duties as a power holder or otherwise indicating acceptance of the appointment to serve as a power holder.

(b) A person designated as a power holder may reject the appointment to serve as a power holder. A trustee may give written notice to a power holder requesting acceptance of the appointment as power holder. A power holder who does not accept such appointment within 120 days after receipt of such notice is considered to have rejected the appointment to serve as a power holder. (2012-18, s. 3.4.)

**§ 36C-8A-8. Powers of trustee in the absence of a power holder.**

The trustee shall be vested with any fiduciary power or duty conferred upon a power holder by the terms of a trust that are described in G.S. 36C-8A-2(a) during the time when no power holder is available to exercise such power or perform such duty because of absence, illness, or other cause. (2012-18, s. 3.4.)

**§ 36C-8A-9. More than one power holder.**

When there is more than one power holder authorized to act, and they are unable to reach a unanimous decision, they may act by majority decision. Unanimity is required when only two are authorized to act. (2012-18, s. 3.4.)

**§ 36C-8A-10. Resignation of power holder.**

(a) A power holder may resign upon either of the following conditions:

- (1) Upon at least 30 days' notice in writing to the qualified beneficiaries, the settlor, if living, and all trustees.
- (2) With the approval of the court.

(b) In approving a resignation, the court may issue orders and impose conditions reasonably necessary for the protection of the trust property. (2012-18, s. 3.4.)

**§ 36C-8A-11. Removal of power holder.**

(a) For the reasons set forth in subsection (b) of this section, the settlor of an irrevocable trust, a trustee of an irrevocable trust, or a beneficiary of an irrevocable trust may request the court to remove a power holder, or a power holder may be removed by the court on its own initiative.

(b) The court may remove a power holder under any of the following circumstances:

- (1) The power holder has committed a serious breach of trust.

- (2) Lack of cooperation with the trustee substantially impairs the administration of the trust.
  - (3) Because of unfitness, unwillingness, or a persistent failure of the power holder to exercise effectively the duties and powers conferred upon the power holder the court determines that removal of the power holder best serves the interests of the beneficiaries.
  - (4) There has been a substantial change of circumstances, the court finds that removal of the power holder best serves the interests of all of the beneficiaries and is consistent with a material purpose of the trust, and a suitable successor power holder is available.
- (c) Pending a final decision on a request to remove a power holder, or in lieu of or in addition to removing a power holder, the court may order appropriate relief under G.S. 36C-10-1001(b) as may be necessary to protect the trust property or the interests of the beneficiaries. (2012-18, s. 3.4.)